

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 20, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0600-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,**

Plaintiff-Appellant,

v.

EDWARD R. ZANDER,

Defendant-Respondent.

APPEAL from an order of the circuit court for Dane County:
MICHAEL N. NOWAKOWSKI, Judge. *Affirmed.*

Before Eich, C.J., Gartzke, P.J., and Sundby, J.

PER CURIAM. American Family Mutual Insurance Company appeals from a circuit court order declaring that its insurance contract with Edward Zander provides insurance coverage for an accident in which Edward

had a car/bicycle accident while he drove his brother Peter Zander's car.¹ Specifically, the circuit court held that a "drive-other-car" policy exclusion in Edward's policy does not preclude coverage. For the reasons set forth below, we affirm.

STANDARD OF REVIEW

Under § 805.17(2), STATS., an appellate court will not set aside a circuit court's findings of fact unless they are clearly erroneous. Under *Ball v. District No. 4, Area Bd.*, 117 Wis.2d 529, 537, 345 N.W.2d 389, 394 (1984), an appellate court determines questions of law without deference to the trial court.

BACKGROUND

Edward Zander owned two vehicles, each insured by American Family under a separate insurance policy. Both policies contained a "drive-other-car" exclusion providing that no coverage would extend for:

[b]odily injury or property damage arising out of the use of any vehicle, other than your insured car, which is owned by or furnished or available for regular use by you or any resident of your household.

(Emphasis deleted.)

On October 16, 1993, Edward Zander drove Peter's car. While driving, Edward was involved in a car/bicycle accident. American Family denied coverage on the grounds that the "drive-other-car" exclusion applied.

¹ This is an expedited appeal under RULE 809.17, STATS.

The issues presented by this appeal are whether Peter's car was "available for regular use by" Edward and whether Peter and Edward were "residents" of the same "household," such that the exclusion applies. The circuit court held that the exclusion does not apply under the facts of this case. We agree.

ANALYSIS
"Household"

The circuit court held that Peter and Edward Zander were not "residents" of the same "household." We agree.

Peter Zander moved out of his parents' home after graduating from high school. He lived independently for six years, maintaining his own renter's and car insurance policies. Shortly before Edward's car/bicycle accident, Peter moved back to his parents' home, in which Edward resided, in order to save money for his upcoming wedding. In anticipation of his marriage, he intended to, and did, move out again after just over nine months. During the months Peter lived in the household of his parents and Edward, Peter maintained his separate renter's policy, and his separate car insurance policy.

In *National Farmers Union Property & Casualty Co. v. Maca*, 26 Wis.2d 399, 408, 132 N.W.2d 517, 521-22 (1965), the Wisconsin Supreme Court stated, "We think that one is not a resident of the household or member of the family if, even though he has no other place of abode, he comes under the family roof for a definite short period or for an indefinite period under such circumstances that an early termination is highly probable."

Peter was under the family roof for approximately nine months. Before he moved in, his wedding date was known, and it was known that he would move out before that date. Further, his purpose in living at his parents' home—to save money for his upcoming wedding—was temporary. Peter was

in the home for a "definite short period." Under *Maca*,² Peter was not a member of the household composed of his parents and Edward.

² Because the matter is controlled by *Maca*, a Wisconsin case, we decline appellant's invitation to consider Minnesota law. Further, because the matter is controlled by precedent, we decline appellant's invitation to create a "public policy" exception. We are not a policy-making court. *State v. Schumacher*, 144 Wis.2d 388, 409, 424 N.W.2d 672, 680 (1988).

"Regular Use"

The circuit court found that Peter had not permitted Edward "regular use" of Peter's car. We agree. The evidence as summarized by the circuit court shows that Peter permitted Edward to use the car on "very sporadic" occasions.

Appellant argues that because Peter's car was "available" for Edward's regular use, the exclusion should apply. However, this argument is precluded by the holding of *Giese v. Karstedt*, 30 Wis.2d 630, 635, 141 N.W.2d 886, 888 (1966). Construing substantially similar policy language,³ the Wisconsin Supreme Court stated that "sporadic and definitely restricted" use did not constitute "regular use" to trigger the exclusion. Further, the court made that ruling under circumstances where, as here, the car in question was available for regular use, but where, as here, no regular use was made.

By the Court.—Order affirmed

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

³ Appellant argues that the policy language in *Giese* can be distinguished from that here. In *Giese*, the exclusion applied when the car was "furnished for regular use ..." in this case, where "furnished or available for regular use." However, this distinction is irrelevant here. The *Giese* court's focus was on "regular use," rather than on whether the car was "furnished."

The issue, whether Edward's use was "regular," is answered in the negative by *Giese*. The car in *Giese* was certainly more "available" than that here (the car's owner was absent in the armed forces), and used a similar number of times as that here (once or twice). The court held that this was not "regular use."